No. 15,788

IN THE

United States Court of Appeals

For the Ninth Circuit

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This is an appeal taken from a final judgment in favor of Appellee and entered in the District Court for the Territory of Alaska, Third Judicial Division on the 12th day of September, 1957.

The District Court had jurisdiction by virtue of the Act of June 6, 1900, c. 786, Section 431, Stat. 322, as amended, 48 USCA Sec. 101. The United States Court of Appeals has jurisdiction of said appeal by virtue of the provisions of Section 1291 of Title 28 of the United States Code (as amended, October 31, 1951, c. 655, Sec. 48, 65 Stat. 726).

STATEMENT OF THE CASE.

The Appellant filed an action in the Justice Court for the Anchorage Precinct, Third Division, Territory of Alaska. The complaint alleged in substance, a contract between the Alaska Dairy Products and the City of Anchorage wherein the Alaska Dairy Products agreed to make a payment in lieu of taxes to the City of Anchorage in return for the City's furnishing certain sewer service. The payment to be made by Alaska Dairy Products, according to the City of Anchorage, was to be equal to the total tax on the Dairy's real and personal property. Alaska Dairy Products filed an answer admitting certain allegations but denying that it owed the City of Anchorage any amount of money, and denying it agreed to pay any amount covering personal property. A copy of the contract was attached to the complaint. Thereafter, a stipulation was entered into by the parties, that the sewer line was installed by the City and was in use, and further stipulated for purposes of the suit in the Justice Court that the sole question to be determined was whether or not property, as used in the contract meant real property, or real property and personal property.

Thereafter on January 2, 1957, a judgment was entered in favor of the Alaska Dairy Products. Oral notice of appeal was given by the City of Anchorage and the cause was now before the District Court for the Third Division.

Appellant moved for leave to file an amended complaint, attaching a copy of said complaint to its mo-

tion. Appellant alleged the same facts in its first claim for relief. Appellant then sought, by way of an amendment, the remedy of reformation in its second claim for relief. Appellant, as a third claim for relief, sought relief under the Declaratory Judgment Act (28 USCA, Sec. 2201) asking the District Court precisely whether or not the City was still bound by such a contract wherein they were performing a governmental function and also whether or not entering into this type of contract for services outside the City was within the scope of its authority under Territorial law.

Appellee, Alaska Dairy Products, filed a memorandum in opposition to Appellant's motion for leave to file an amended complaint. This motion was argued before the court and the court on the 14th day of June, 1957, by minute order, denied Appellant's leave to file an amended complaint.

Thereafter, the Appellant City filed a new complaint which became Cause No. A-13,503 seeking a declaratory judgment and certain other relief. The relief sought in this complaint is essentially the same as the second and third claims for relief in the proposed amended complaint in Cause No. A-13,001, seeking a declaratory judgment and reformation. Appellee, Alaska Dairy Products, thereafter filed a motion to dismiss, supported by a memorandum. The motion was heard by oral argument, and on the basis of the oral argument and the memorandums filed by both sides, the Court, by minute order on September 5, 1957, dismissed Appellant's complaint on the

grounds that it had previously been decided in the cause before the Justice Court, and ordered counsel to prepare written order accordingly. Appellee submitted a judgment dismissing Appellant's complaint ordering, adjudging and decreeing the action be dismissed with prejudice. Thereafter, the Appellant appealed to this Court by giving notice of appeal, filed in the District Court on the 7th day of October, 1957.

SPECIFICATION OF ERROR.

1. The Court erred in not allowing Appellant to amend its complaint after appeal from Justice Court in Cause No. A-13,001.

2. The Court erred in denying the additional relief sought by Appellant in District Court where trial is *de novo* and relief was not available in the Justice Court.

3. The Court erred in granting Appellee's motion to dismiss.

4. The Court erred in ruling Appellant's claim for relief was previously determined by Justice Court.

5. The pleadings in the original action in Justice Court pleaded no claim for relief under the Declaratory Judgment Act, nor sought reformation.

6. The Justice Court is a court of limited jurisdiction and had no jurisdiction to try causes seeking equitable relief.

7. The issues raised by the pleadings in this case were not determined by the judgment in the Justice Court.

8. The pleading in this case pleaded new causes of action not previously determined.

ARGUMENT AND AUTHORITIES.

ARGUMENT I.

THE COURT ERRED IN NOT ALLOWING PLAINTIFF TO AMEND THE COMPLAINT AFTER AN APPEAL WAS PERFECTED FROM THE JUSTICE COURT.

Rule 15(a) of the Federal Rules of Civil Procedure requires leave of court to amend a complaint after responsive pleading has been served. The motion for leave to file an amended complaint was urged in the District Court (TR p. 19).

The reasons for such amendment were stated in the motion, the chief reason being to allow the Appellant to try in one action already begun, all the matters in dispute with the Appellee. The general test, and it would seem the best test for allowing or disallowing amendments of pleadings, is whether or not justice would be promoted by the proposed amendment (*Securities and Exchange Commission v. Universal Services Association,* 106 F. 2d 232, cert. denied, 308 U.S. 622, 84 L.Ed. 519, 60 S.Ct. 378). Also important in deciding such a motion is whether or not any injustice is worked on the opposing party by allowing the amendment (*Fierstein v. Piper Aircraft,* 79 F. Supp. 217). No claim of prejudice was made or could the Appellee urge that any injustice be worked by allowing such an amendment. As is pointed out in Appellee's memorandum supporting the motion of objec-

tion to Appellant's designation of record on appeal (TR p. 44). Allowance or disallowance of an amendment is discretionary and not a final or appealable order. Appellant however, urges this point to properly put before this Court the background of the case. The complaint and necessarily the judgment in the first case, which became Cause No. 13,001 after appeal from the Justice Court (TR p. 3) is before this Court because it must necessarily be a portion of the record as the District Court ruled that the issues decided by the judgment in that cause precluded relitigating the issues raised in the complaint filed in Cause No. 13,503 (TR p. 27) as they had already been decided in the Justice Court and therefore would be *res judicata.*

Amendments to complaints after an appeal from the Justice Court are also governed in Alaska by Section 68-9-14, ACLA 1949 which section is as follows:

> AMENDMENTS: FORMAL PLEADINGS. In all cases of appeal the bill of items of the account sued on, or filed as a counterclaim or set-off, or the abatement of the plaintiff's cause of action, or of the defendant's counterclaim or set-off, or other ground of defense filed before the justice, may be amended upon appeal in the appellate court to supply any defect, deficiency, or omission therein, by filing formal pleadings therein when by such amendment substantial justice will be promoted; and in all cases when required by the court, or by either party to the action, formal pleadings shall be filed on either side upon the trial of the cause on appeal; when

> either party requires such formal pleadings he shall cause to be served on the opposite party a notice thereof in writing, and file the same in the court where the cause is pending by the first day of the term of such court at which such cause is to be tried; but no new item or cause of action not embraced or intended to be included in the original account or statement shall be added by such amendment.

This section was urged by the Appellee in opposing the motion for leave to file an amended complaint. Though no reasons were stated in the minute order (TR p. 26) denying leave to file an amended complaint, it might be assumed that the District Court decided the motion on the basis of the last portion of that section, which is, ". . . but no new item or cause of action not embraced or intended to be included in the original account or statement shall be added by such amendment." If this was the portion of the statute that the District Court relied on in denying the motion for leave to file an amended complaint, the denial of the motion would have been proper. But then we are faced with the problem of how the Court could then rule that the claim for relief urged in the complaint in Cause No. 13,503 (TR p. 27) had been previously decided by the Justice Court as the court ruled in the minute order (TR p. 34). In other words, if the Court decided that the amended complaint urged new claims for relief and therefore by virtue of the above quoted section these new claims were not proper to be added by amendment, how then could the Court say that these claims or causes of action had already been decided.

ARGUMENT II.

THE JUSTICE COURT FOR THE TERRITORY OF ALASKA IS A COURT OF LIMITED JURISDICTION, ITS JURISDICTION IS GOVERNED BY STATUTE AND THE CLAIMS FOR RELIEF PLEADED IN CAUSE NO. 13,503 COULD NOT HAVE BEEN BROUGHT IN THE JUSTICE COURT.

The jurisdiction of the Justice Court is stated in Section 68-2-1, ACLA 1949 as follows:

> ACTIONS WITHIN JURISDICTION: JUDGMENT ON CONFESSION.
>
> A justice's court has jurisdiction, but not exclusive, of the following actions:
>
> First. For the recovery of money or damages only when the amount claimed does not exceed one thousand dollars;
>
> Second. For the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed one thousand dollars;
>
> Third. For the recovery of any penalty or forfeiture, whether given by statute or arising out of contract, not exceeding one thousand dollars;
>
> Fourth. Also to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute.

The next Section, 68-2-2 provides:

> ACTIONS NOT WITHIN JURISDICTION.
>
> The jurisdiction conferred by the last section does not extend, however—
>
> First. To an action in which the title to real property shall come in question;

> Second. To an action for false imprisonment, libel, slander, malicious prosecution, criminal conversation, seduction upon a promise to marry, in actions of an equitable nature, or in admiralty causes.

It is thus provided that equitable actions are specifically excluded from the jurisdiction of the Justice Court.

In Appellant's second claim for relief (TR p. 30) Appellant asks for reformation of the agreement, thus we see that not only was the equitable cause of reformation not pleaded in the cause filed in the Justice Court, but that had it been pleaded it could not have been heard nor passed on as not being within the jurisdiction of that Court. In Appellant's first claim for relief (TR p. 27) appellant seeks relief under the Declaratory Judgment Act. It is urged that the Justice Court also had no jurisdiction to try an action for declaratory judgment. In the District Court's minute order dismissing the complaint in Cause No. 13,503 the Court said, (TR p. 34) that the declaratory judgment act is procedural and does not create new rights upon a cause of action previously decided. Assuming for purposes of argument that this portion is correct, it is urged that the second claim for relief filed in Cause No. 13,503 in the complaint, raises the issue of whether or not the Appellant is entitled to reformation. It is urged that at least this claim for relief was not and could not have been decided in the Justice Court which lacked jurisdiction, and therefore the doctrine of *res judicata* is not applicable to this claim for relief.

ARGUMENT III.

THE COURT ERRED IN RULING THAT THE ISSUES DECIDED IN THE INITIAL ACTION FILED WERE CONCLUSIVELY DETERMINED AS BETWEEN THE PARTIES UNDER THE DOCTRINE OF RES JUDICATA.

The Court granted Appellant's motion to dismiss complaint in Cause No. 13,503 and ruled that the "Issues decided in initial action filed by a party are conclusively determined as between the parties under the doctrine of *res judicata* . . ." (TR p. 34). The ruling of the Court is unintelligible at best. The Court confuses the doctrine of collateral estoppel and *res judicata.* It remains however that the judgment of dismissal was signed and entered. As there are no findings or conclusions, the minute order must stand as the basis of the Court's ruling. It must be assumed then that the District Court ruled that the judgment in the Justice Court (TR p. 17) precluded the Appellant, City of Anchorage from litigating the claims for relief in the complaint filed in Cause No. 13,503 (TR p. 27). In this the Court was in error. To determine what issues were conclusively determined, or what cause of action was decided by the Court in the first instance which was the Justice Court, one must look at the pleadings. In the instant case the pleadings, as originally filed, are further limited and narrowed by a stipulation entered into by the parties (TR p. 12). It is worthy to note that in paragraph 6 of that stipulation (TR p. 13) we find the following language: ". . . the sole question to be decided herein is whether or not the word 'property' as used in said contract means real property or

whether it means real and personal property." The judgment then rendered by the Justice in the Justice Court (TR p. 17) ruled that Appellant was not entitled to relief, and thus decided that the word property, contained in the agreement (TR p. 6) meant only real property and that therefore the Appellant was not entitled for the amount sued for which would have been due had the word property meant real and personal property.

It cannot be assumed that the Justice in entering this judgment would go beyond the stipulation in arriving at his decision. An appeal was taken from this judgment as indicated (TR p. 18). After this appeal was taken, the cause was then before the District Court. A trial in the District Court on an appeal from the Justice Court is a trial *de novo* (ACLA 1949, 68-9-10). Whether or not the stipulation would limit the District Court in determining the cause as appealed remains in question. However, at this point with or without the stipulation, it remains that the Justice Court only passed on the issues as framed by the pleadings and these pleadings were further limited by the stipulation. Although the defense of *res judicata* is not one specifically provided for by the Federal Rules as one of the defenses that can be raised on a motion to dismiss, here both proceedings being before the same Court and Judge, the fact that this defense was not pleaded, but raised in a motion to dismiss may be acceptable procedure. However, the defense of *res judicata* should generally be pleaded (*Cruz-Sanchez v. Robinson*, 136 F. Supp. 52). The pleading and proving of the defense of *res judicata*

is the better practice. Assuming that the stipulation filed by the parties to the original action in the Justice Court did not limit the issues that would be considered finally adjudicated unless changed on appeal to the District Court, it must be determined what was passed on by the Justice Court and thus precluded from being raised by the parties in the subsequent proceedings.

Judge Holmes has stated the principals involved in *res judicata* in the case of *Hyman v. Regenstein,* 222 F. 2d 545, page 549, "In order to make a matter res judicata, there must be a concurrence of four conditions, namely: 1. Identity in the thing sued for; 2. Identity of the cause of action; 3. Identity of persons and of parties to the action; 4. Identity of the quality in the persons for or against whom the claim is made." The Court went on to say later, "These are affirmative defenses that must meet the test required by the doctrine of res judicata." (Ibid.) In the instant case, the Court ruled without benefit of pleading or evidence. In examining the present record, it can be seen that only items 3 and 4 have been met. The persons and parties to the action are the same, and the identity of the quality of the persons is the same. However, the identity of the thing sued for and the identity of the cause of action are not the same. The Appellant-Plaintiff below, in the Justice Court, asked in his prayer for relief for the amount of $400.00 in a money judgment based on the contract between it and the Appellee. The basis of Appellant's claim was the contract entered into by it and the Appellee wherein the Appellee agreed to pay

certain monies to the Appellant in lieu of taxes for sewer services to be rendered by the City of Anchorage. It was the Appellant's contention that such payment in lieu of taxes be equal to the total City levy including both real and personal property of the Appellee Alaska Dairy Products. Appellee in its answer (TR p. 10) admitted paragraphs 1 through 5 of Appellant's complaint, admitted that the assessed valuation of its personal property was $46,000.00 but denied that it ever agreed to pay the City of Anchorage any amount because of personal property. Stipulations were made and evidence was heard by the Justice. The judgment was entered (TR p. 17) ruling that the City, Appellant here, had no money coming from Alaska Dairy Products and that the agreement entered into by the parties contemplated only a payment in lieu of taxes on the real property of the Appellee. This case was then appealed. In examining the complaint in Cause No. 13,503 (TR p. 27) as to the thing sued for, or the prayer for relief in that complaint, (TR p. 31) here Appellant asks that the Court reform the instrument according to the intent of the parties, further, that the Court declare certain rights and duties under the contract entered into by the party, but no allegation is made that the Court declare that the word property, as used in the contract, mean real and personal property as the Justice Court in the first case already decided that as used in the contract it meant only personal property. It is thus urged that Test No. 1, layed down by Judge Holmes, "Identity to the things sued for" has not been met. As to Point No. 2, "Identity of the cause

of action", it is maintained that the cause of action is not the same either. It is urged that the cause of action originally filed in the Justice Court was a cause of action for money due and owing on a contract and involves an interpretation of that contract. The judgment was against the Appellant and the interpretation was in favor of the Appellee. In the complaint, which is the subject of this appeal, Appellant is asking that the Court reform the instrument according to the intent of the parties. The facts alleged which would necessarily have to be proven to entitle the Appellant to reformation are not the same facts that were proved to obtain the judgment in the original cause filed in the Justice Court. Appellant in this latter complaint also asks for a declaratory judgment. It is true that this could involve a redetermination of the meaning of the words as used by the parties in the contract. However, in examining the allegations in the pleading, it is obvious that different allegations are made and different facts would need to be proven in order to establish the claims made in the prayer for relief. It is therefore urged that the identity of the cause of action is not the same and the defense as urged by the Appellee of *res judicata* has failed to meet the second test laid down by Judge Holmes.

The principals involved in the defense *res judicata* are general in nature. Each case must be examined as to its own fact situation. It is urged here that different causes of action or claims for relief are pleaded in the second complaint. Support for the conclusions that where different causes for action were pleaded even though the parties were the same,

the defense of *res judicata* will not be sustaind, can be found in *Speed Products Co. v. Tinnerman Products,* 222 F.2d 61. Under the defense of *res judicata,* a second suit is barred on the *same* (emphasis supplied) cause of action (*Lawler v. National Screen Services Company,* 75 S.Ct. 865, 349 U.S. 322, 99 L.Ed. 1122).

Equally applicable in the instant case, as in the *Tinnerman* case, *Speed Products Co. v. Tinnerman Products*, 222 F. 2d 61, is that certain matters that were actually litigated cannot be again litigated because of the defense of collateral estoppel. If the stipulation (TR p. 12) has any bearing, the only major issue actually litigated in the Justice Court was the meaning of the word "property" as used by the parties in the agreement (TR p. 6). Under the similar theory of collateral estoppel the issues actually litigated in the first action cannot be relitigated in the second suit (*Lawler v. National Screen Services Company,* 75 S.Ct. 865, 349 U.S. 322, 99 L.Ed. 1122; *Fairmount Aluminum v. Commission of Internal Revenue,* 222 F. 2d 622, cert. denied 76 S.Ct. 76, 350 U.S. 838, 100 L.Ed. 748, rehearing denied 76 S.Ct. 177, 350 U.S. 905, 100 L.Ed. 795, rehearing denied 77 S.Ct. 144, 362 U.S. 913, 1 L.Ed. 2d 120; *Parker v. Westover*, 221 F. 2d 603; *Providential Development Co. v. U. S. Steel Co.,* 236 F. 2d 277).

Query. How, on the basis of the record before the District Court, could the Court determine exactly what issues were passed on by the Justice Court? If certain issues have been finally adjudicated, the record on appeal is not conclusive as to which exactly they

are. Yet the District Court has said in effect, the Appellant has stated no claim for relief and has dismissed Appellants action. The Court has dismissed an action presumably based on the doctrine of *res judicata,* but talks in the minute order in terms of collateral estoppel. There certainly isn't enough in the record to sustain dismissing Appellant's action.

CONCLUSION.

1. Appellant has stated valid claims for relief which have not previously been decided by a Court of competent jurisdiction.

2. The Court erred in dismissing Appellant's action based on a ruling that issues decided in initial action filed by a party are conclusively determined as between the parties.

It is therefore urged that the judgment dismissing Appellant's action be reversed and Appellant prays that Appellee be required to answer the complaint.

Dated, Anchorage, Alaska,
February 27, 1958.

Respectfully submitted,

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